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Supreme Court, U.S.
FILED
MAY 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

LEONARD J. JULIEN,
Petitioner,

v.

HENRY ZERINGUE, ZERINGUE'S FARM EQUIPMENT SERVICE, and JOHN CLET LANDRY; and

THOMSON INTERNATIONAL, INC., LABADIEVILLE MACHINERY CO., INC., and ROBERT BOUDREAUX,
Respondents.

ADDITIONAL APPENDIX FOR PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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This ADDITIONAL APPENDIX contains:[1]

D - CAFC Clerk's Order of February 7, 1989 Denying Petition for Rehearing 1

E - CAFC Clerk's Order of February 17, 1989 Declining Suggestion for Re-Hearing *en banc* 3

and

G - Trial Court's Judgment & Opinion of November 17, 1986 5

Appen. A&B are in the back of the PETITION:

A - CAFC's Opinion of January 5, 1989 on the Patent Issues

B - CAFC's Order of January 5, 1989 re Sanctions

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[1]Petitioner originally submitted Appen. D & E and G in a separately bound, letter size "Supplemental Appendix," along with Appen. C, F(1)&(2) and H-P. However, the clerk's office ruled that they needed to be submitted in this smaller size format, and hence they are being resubmitted in this form.

U.S. COURT OF APPEALS FOR FEDERAL CIRCUIT

87-115, -1139

LEONARD JULIEN,

Plaintiff-Appellant,

v.

HENRY ZERINGUE, ZERINGUE'S FARM EQUIPMENT SERVICE and JOHN CLET LANDRY

Defendants/Cross-Appellants,

and

THOMSON INTERNATIONAL, INC., LABADIEVILLE MACHINERY CO., INC. and ROBERT BOURDREAUX,

Defendants-Appellees.

Before BISSELL, ARCHER and MICHEL, Circuit Judges.

O R D E R

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT

February 7, 1989

/s/Francis X. Gindhart
Francis X. Gindhart
Clerk

cc: C. Emmett Pugh
E. Richard Zamecki
John M. Coman, Jr.

U.S. COURT OF APPEALS FOR FEDERAL CIRCUIT

87-115, -1139

LEONARD JULIEN,

Plaintiff-Appellant,

v.

HENRY ZERINGUE, ZERINGUE'S FARM EQUIPMENT SERVICE and JOHN CLET LANDRY

Defendants/Cross-Appellants,

and

THOMSON INTERNATIONAL, INC., LABADIEVILLE MACHINERY CO., INC. and ROBERT BOURDREAUX,

Defendants-Appellees.

O R D E R

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is declined.

FOR THE COURT

February 17, 1989 /s/Francis X. Gindhart
Francis X. Gindhart
Clerk

cc: C. Emmett Pugh
E. Richard Zamecki
John M. Coman, Jr.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LEONARD J. JULIEN	CIVIL ACTION
VERSUS	NO. 82-0673
ZERINGUE'S FARM EQUIPMENT SERVICE, HENRY ZERINGUE and JOHN CLET LANDRY	SECTION "C"
LEONARD J. JULIEN	CIVIL ACTION
VERSUS	NO. 83-2267
THOMSON INTERNATIONAL, INC. and ROBERT BOUDREAUX	SECTION "C"

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JUDGMENT

In accordance with the Opinion of this Court signed on November 10, 1986,

IT IS ORDERED, ADJUDGED AND DECREED that there be JUDGMENT in favor of defendants, Zeringue's Farm Equipment Service, Henry Zeringue, John Clet Landry, Thompson International, Inc. and Robert Boudreaux, and against plaintiff, Leonard J. Julien.

This action is dismissed with prejudice, all parties to bear their respective costs.

IT IS ALSO ORDERED, ADJUDGED AND DECREED that there be JUDGMENT in favor of plaintiff, Leonard J. Julien, and against defendants, Zeringue's Farm Equipment Service, Henry Zeringue and John Clet Landry, on the issue of the counterclaim.

New Orleans, Louisiana, this the 18th day of November, 1986.

_____

LORETTA G. WHYTE,
CLERK OF COURT

BY: _____
Denny P. Descent
Chief Deputy Clerk

APPROVED AS TO FORM:

_____

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

LEONARD J. JULIEN	CIVIL ACTION
VERSUS	NO. 82-0673
ZERINGUE'S FARM EQUIPMENT SERVICE, HENRY ZERINGUE and JOHN CLET LANDRY	SECTION "C"
LEONARD J. JULIEN	CIVIL ACTION
VERSUS	NO. 83-2267
THOMSON INTERNATIONAL, INC. and ROBERT BOUDREAUX	SECTION "C"

* * * * * * * * * * * * * * * * * *

This case was tried before the Court, sitting without a jury, and was taken under submission. After careful consideration of the evidence presented at trial, counsel's arguments, submitted memoranda and the relevant facts and applicable law, the Court hereby makes the following FINDINGS OF FACT AND CONCLUSIONS OF LAW, pursuant to the provisions of Federal Rules of Civil Procedure 52.

FINDINGS OF FACT

The Claims

1. This is an action by Leonard J. Julien against Zeringue's Farm Equipment Service, Henry Zeringue and John Clet Landry for infringement of Claims 1, 3, and 6-9 of United States Letters Patent No. 3,286,858 entitled "Cane Planter." Plaintiff's complaint seeks judgment for treble damages and interest, together with attorney's fees, costs, and all other equitable relief.[1]

2. The counterclaim by Zeringue's Farm Equipment Service, Henry Zeringue and John Clet Landry against Leonard Julien prays for a declaratory judgment that Claims 1-10 of United States Letters Patent No. 3,286,858 be considered invalid as anticipated and obvious over the prior art, invalid and unenforceable as fraudulently obtained,

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[1]Plaintiff has dismissed his claim for injunctive relief due to the expiration of the patent in suit on January 6, 1983.

unenforceable under the principles of laches and equitable estoppel, and not infringed by any act of the counterclaim.

3. Zeringue's Farm Equipment Service, Henry Zeringue and John Clet Landry also seek to have this case declared "exceptional," and to be awarded attorney fees and costs under 35 U.S.C. § 285 and excess costs, expenses and attorney fees under 28 U.S.C. § 1927 and Fed. R. Civ. P. 11. They argue that Leonard Julien maintained this suit without a "good faith" belief in the validity, enforceability or infringement of the patent.

The Parties

4. Leonard J. Julien, Sr., is the inventor named in the patent suit.

5. Zeringue's Farm Equipment Service is an unincorporated partnership owned by Henry Zeringue and John Clet Landry. Its principal place of business is located in

this district in St. James Parish, Louisiana, at which it has allegedly committed acts of infringement.

6. Defendants, Henry Zeringue and John Clet Landry, are general partners in Zeringue's Farm Equipment Service and are residents of this district.

7. No privity exists or has ever existed between Gomez & Andre Tractor Repairs, Inc. and Zeringue's Farm Equipment Service, Henry Zeringue or John Clet Landry with respect to any device which was or may have been the subject matter of Julien v. Gomez & Andrew Tractor Repairs, Inc., 438 F. Supp. 763 (M.D. La. 1977), or the present action.

The Patent in Suit

8. United States Letters Patent No. 3,286,858 was issued on November 22, 1966 in the name of Leonard J. Julien and is directed to a sugar cane planter.

9. From May 20, 1965 until January 6, 1983, United States Letters Patent No. 8,286,858 and the application from which it matured was jointly owned by Leonard Julien and the law firm of Polack, Rosenberg, Rittenberg & Endom or its predecessors in interest.[2]

10. The invention of United States Letters Patent No. 3,286,858 is directed to a device for planting sugar cane that employs several overhead conveyors positioned above a cane cart.

11. The patent contains ten claims. Claim 1 is directed to cane planting machinery for cooperation with a cane wagon, said machinery comprising

> "a portably mounted main frame, an elongated sub-frame suspended from the main frame, means for connecting the main frame to the wagon in a position in which at least one end of the sub-frame is suspended over the wagon and

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[2]The law firm owned a 15% interest in the patent which was later reassigned to plaintiff Julien.

is constrained to travel therewith, means for raising and lowering the sub-frame relative to the main frame, at least one flexible endless carrier means mounted on the sub-frame to travel in a predetermined path relative thereto, means for driving the endless carrier means; grab means adapted to open and close in a direction transverse to the predetermined path and carried by and spaced longitudinally along the endless carrier means; means for biassing the grab means to their closed position; expander means on the sub-frame positioned to temporarily open the grab means at a cane pick-up point near one end of the sub-frame and at a cane release point near the other end of the sub-frame, and upwardly open trough means positioned beneath the release point to receive cane released by the grab means and to guide it into a predetermined position relative to the path of travel of the wagon."

12. Claims 2-10 include all of the features of Claim 1 and are drawn to more specific features.

13. Claim 2 additionally specifically requires a telescoping means to connect the main frame and the elongated sub-frame of Claim 1.

14. Claim 3 specifically requires a particular construction and placement of the trough means of Claim 1.

15. Claim 4 specifically requires a particular construction of the grab means, biasing means and expander means of Claim 1.

16. Claim 5 specifically requires the grab means of Claim 4 to include spikes on the outer ends to engage the cane.

17. Claim 6 specifically requires a plurality of the flexible, endless carrier means and expander means of Claim 1.

18. Claim 7 specifically requires a particular configuration of the grab means of Claim 6.

19. Claim 8 specifically requires a particular configuration and placement of the elongated sub-frame, the plurality of flexible, endless carrier means and the trough means of Claim 6.

20. Claim 9 specifically requires a particular power source for the driving means of Claim 1.

21. Claim 10 requires independent vehicular means, specifically a tractor, which partially supports the main frame of Claim 1 and which carries and is driven by the power source of Claim 9.

Background on the Development of the Cane Planter

22. Prior to 1964, the Louisiana sugar cane industry had successfully mechanized all of the agricultural aspects of the sugar cane industry, including the ground preparation, loading, transporting, ground finishing, harvesting, and unloading of the cane. The only area which had not been successfully mechanized was the planting operation, which required a relatively careful metering of cut whole cane stalks, approximately six to eight feet and somewhat crooked along its

length, down a line in over-lapped fashion in a furrow in the ground.

23. Until 1964, the planting of cane had to be done totally by hand or with the assistance of a planter's aid wagon which required hand-labor to move and position the cane from the wagon into the furrow.

24. For many years prior to 1963, well-funded researchers and workers in the Louisiana sugar cane field attempted to fulfill the long-felt need in the sugar cane industry for a fully mechanized sugar cane planter, but to no avail.

25. These prior, unsuccessful attempts included substantial efforts by the U.S. Department of Agriculture in cooperation with the Sugar Cane League in the mid-50's; LSU's School of Agriculture in the late 1950's and early 1960's; and the engineering divisions of J&L Engineering, Thomson International Co. (nee Thomson Machinery) and the Cane Machinery and Equipment Co. (CAMECO),

which were the largest cane machinery manufacturing companies in the industry and all established innovators.

26. Plaintiff, a farmer in Modeste, Louisiana, invented, developed, built, demonstrated and successfully operated the first fully mechanized, successful, practical machine for planting whole Louisiana sugar cane with its crooked length in 1961 through 1964.

27. His pioneering invention was immediately recognized as the first successful solution to the industry's long standing need for such a machine to replace the inefficient, expensive and generally unavailable hand-labor theretofore required for cane planting. The Julien planter was seen as the final link that was needed for the full mechanization of planting and harvesting of Louisiana sugar cane. Exhibits submitted by plaintiff convince this Court that the device had indeed revolution-

ized the industry at the time of its inception.

28. In 1964, Julien applied for a patent and received U.S. Patent 3,286,858 on November 22, 1966 for his invention. This gave him the exclusive rights on his invention for 17 years.

29. As noted in Claims 1, 3 and 6-9 (P-4 & 4E) read in the light of the specification (P-1), the Julien patent covers a planter for whole cane which uses one or more variable width, staggered parallel moving cane grabs on an "endless" conveyor or carrier. The grabs cyclically and non-destructively engage cane from their top where they are loaded longitudinally in a moving open wagon-like vehicle transported by a tractor or other suitable motorized vehicle. The cane grabs sequentially engage the top-most cane of the load that is stacked across the width of the wagon, non-destructively grab it at a single point

along its length, and pull it off the back of the wagon down into a rear V-shape trough or guide. The trough system on the end of the wagon-like vehicle guides and positions the cane falling under the force of gravity longitudinally down along the center-line of the furrow, as the planter moves along over the furrow. Thus, regardless of where the cane may have been loaded in the wagon or where it is picked up by the cane grabs, the trough guide system guides the falling cane over to the center line and into the furrow. As the cane is depleted, the grabs and the cane are moved toward each other. The Julien patent was successful in accomplishing its unique objectives, and at the time proved to be a commercial success. Plaintiff's patent is valid and is deserving of broad and primary treatment.

30. Defendants have attempted to establish the existence of a prior art for the entire patent and/or the various ele-

ments or parts of the Julien Patent No. 3,286,858: United States Patent No. 2,213,774 to Frank E. Taylor (disclosing a transfer device including an elongated sub-frame); United States Patent to Turner No. 2,411, 348 (discloses apparatus which includes an elongated sub-frame); United States Patent to Barchoff No. 2,705,659, Ramp No. 3,286,858, Arceneaux No. 2,841,103, Anderson No. 2,840,269, Hulett No. 2,617,556, Estevez No. 1,764,159, Kassebeer No. 1,678,643, Stephenson No. 1,280,895, Lojacono No. 1,000,529, Roop No. 662,135, Aguiar No. 552,449, O'Bourke No. 454,758, Holmes No. 347,800, Cortes No. 60,620 (disclosing a portably mounted sugar cane planter); and the sugar cane planter of Mansel M. Mayeaux described and illustrated in Defendant's Exhibits 48, 68-88 and 205-207.

31. Defendants failed to establish any prior art which discloses all, or substan-

tially all, of the elements claimed under the Julien 3,286,858 Patent.

Infringement

32. In order to obtain a part of the cane planter market, some unlicensed manufacturers of sugar cane planters began to arise. One of them, Gomez & Andrew Tractor Repairs, Inc., began making a sugar cane planter very similar to that of the then current Julien planter but with a modified, V-shaped, variable width, wedge cane grabs (referred to by defendants as "rakes."

33. In the Julien planter, the variable width grabs were made of opposed, pivoted fingers which were biased toward each other "with give" through a non-destructive spring bias. The opposed pivoted fingers formed a larger "V" shape when opened and a smaller "V" shape when closed. In the Gomez & Andre planter, the grabs were made from the so-called "rake" structure,

which formed a "V" shape. It had a variable width wedge structure into which the cane was engaged and wedged.

34. Plaintiff filed a patent infringement suit against Gomez & Andre in the Middle District of Louisiana on August 20, 1976. The parties stipulated that defendant Gomez' planter was the same as plaintiff's in every material respect expect for the grab device. In view of the pioneering nature of the Julien invention, the Court held that the Julien patent was entitled to broad coverage, and the Gomez & Andre planter (and in particular the so-called "rake" cane grab) was held to be equivalent to the Julien patent and therefore an infringement. 438 F. Supp. 763 (M.D. La. 1977), aff'd, 607 F.2d 1004 (5th Cir. 1979).

35. Defendant, Zeringue's Farm Equipment Service, has had some involvement in sugar cane planters. It made finger type grabs for one of Mr. Julien's licensees and

thereafter worked on a cane planter which had "rakes." It also has had some involvement in rotary drum type planters.

36. For a period of time, defendant, Zeringue's Farm Equipment Service, collected money from some of its customers involving sugar cane planters for possible patent claims.

37. Zeringue, after making the "V" shaped finger grabs for the Julien planters for one of Mr. Julien's licensees, made cane planters with the so-called "rake" or "V" shaped wedge grabs substantially identical to those of Gomez & Andre.

38. Labadieville Machinery/Robert Boudreaux, a licensed manufacturer of the Julien planter, substituted these so-called "rake" elements or "V" shaped wedge grabs in place of the "V" fingers of the original Julien design, and paid royalties to Mr. Julien for the machines which incorporated these "V" shaped wedge substitutions.

Similarly, plaintiff asserts that Zeringue charged patent royalties to his customers for his "Gomez & Andre" type planters with the "V" shaped wedge or "rake" cane grabs. However, no royalties were paid to Mr. Julien or to anyone else, but were retained as extra, unearned "profits."

39. Thereafter, plaintiff argues, the unlicensed manufacturers, including defendants Zeringue and Thomson, made a further, secondary modification to the cane planters.

40. In the Julien planter, the cane grabs were mounted on the peripheral surface of an "endless" conveyor made from chains mounted on rotating, circular sprockets, which caused the cane grabs to be rotated round and around in a cyclical, circular fashion. In the further modified unlicensed planters, slats made of angle iron were placed across the chains to serve as an endless carrier for the "rake" V-shape wedge grabs.

41. This slat-type chain conveyor or carrier for the cane grabs was initially made on or about 1976 by defendant, Robert Boudreaux, at Labadieville Machinery, Mr. Julien's primary licensee in the early 1970's through 1975. In their final year of active manufacturing operation, Boudreaux/Labadieville Machinery then sold the parts for approximately seven slat-chain-type planters and thereby provided customers for defendant Thomson during 1977. This transaction, plaintiff asserts, began defendant Thomson's infringement activities.

42. A rotating, circular metal drum was substituted for the slat/chain/sprocket arrangement as the "endless" conveyor for the peripherally supported cane grabs, which likewise caused the cane grabs to be rotated round and around in a cyclical, circular fashion. This form of the planter is called the "rotary drum" planter.

43. In the context of the pioneering Julien patent, the rotary drum, like the so-called "rake" of the Gomez & Andrew case, plaintiff argues, is an equivalent, infringing substitution of one equivalent mechanical part for another.

44. Thus, upon the completion of the Gomez & Andre litigation, suit for patent infringement was brought against defendants, Zeringue and Thomson.

File Wrapper Estoppel

45. Defendants have raised the doctrine of "file wrapper estoppel" as a defense to plaintiff's claim of equivalency. This doctrine prevents a patentee from reclaiming through the doctrine of equivalents that which was voluntarily surrendered by the narrowing of the language of the patent claims in order to avoid prior art cited by the Patent Office, Continental Oil

Co. v. V. Cole, 634 F.2d 188 (5th Cir. 1981).

46. The file wrapper estoppel arising due to the amendment and attorney arguments filed on June 16, 1966 limits all of the claim to cane planting machinery including "a portably mounted" main frame with "means for connecting said main frame to said vehicle in a position in which at least one end of said sub-frame is suspended over said vehicle and is constrained to travel therewith," and wherein the main frame is portably mounted separate and apart from the cane wagon in order to permit easy substitution of one wagon for another with a single planting machine.

47. The file wrapper estoppel arising due to the amendment and attorney arguments filed on June 16, 1966 limits the claims to cane planting machinery including "an elongated" sub-frame having expander means thereon to "temporarily" open the grab means

"at a cane pick-up point near one end of the sub-frame and at a cane release point near the other end of the sub-frame," or the equivalent thereof. (Defendants' Exhibit 97-99)

48. None of the alleged infringing devices includes a portably mounted main frame or the equivalent thereof. In fact, the cane planting equipment is clearly an integral part of the cane wagon in the case of each of the device alleged herein to infringe plaintiff's Patent No. 3,286,858.

49. None of the alleged infringing devices includes means for connecting a main frame to a cane wagon in a position in which at least one end of a sub-frame is suspended over the cane wagon is constrained to travel therewith in the releasable fashion required by the file wrapper arguments set forth in the amendment filed on June 16, 1966, or the equivalent thereof.

50. None of the alleged infringing devices is used in cooperation with a separate open-topped vehicle, or the equivalent thereof.

51. None of the alleged infringing devices include a sub-frame that is elongated, or the equivalent thereof.

52. None of the alleged infringing devices include a sub-frame "suspended from" a main frame, or the equivalent thereof.

53. None of the alleged infringing devices include a means for raising and lowering a sub-frame relative to a main frame, or the equivalent thereof.

54. None of the alleged infringing devices include a sub-frame which can be raised and lowered relative to a main frame as defined in Claim 1 of United States Letters Patent No. 3,286,858 (D-10), or the equivalent of such a sub-frame.

55. None of the alleged infringing devices include a flexible endless carrier

means mounted on a sub-frame to travel in a predetermined path relative thereto, or the equivalent thereof.

56. None of the alleged infringing devices include grab means, or the equivalent thereof.

57. None of the alleged infringing devices include biasing means, or the equivalent thereof.

58. None of the alleged infringing devices include expander means, or the equivalent thereof.

59. None of the alleged infringing devices include grab means, or means for grabbing, carried by and spaced longitudinally along a flexible, endless carrier means, or the equivalent thereof.

60. None of the alleged infringing devices include grab means, or means for grabbing, adapted to open and close in a direction transverse to the path of travel

of a flexible, endless carrier means, or the equivalent thereof.

61. None of the alleged infringing devices include expander means, or means for expanding, positioned to "temporarily open" a grab means at a cane "pick-up point" near one end of a sub-frame and at a cane "release point" near the other end of the sub-frame and located "on the sub-frame," or the equivalent thereof.

62. None of the alleged infringing devices include an elongated sub-frame having expander means thereon to temporarily open grab means at a cane pick=up point near one end of the sub-frame and at a cane release point near the other end of the sub-frame, or the equivalent thereof.

63. None of the alleged infringing devices include a cane release point near one end of a sub-frame, or the equivalent of such a point.

64. None of the alleged infringing devices operate by, or include apparatus for, either grabbing cane, or picking up and releasing cane, or the equivalent of such operations or apparatus.

65. None of the alleged infringing devices include upwardly open trough means, or the equivalent thereof.

66. None of the alleged infringing devices include upwardly open trough means positioned beneath a release point to receiving cane released by a grab means and guide the cane into a predetermined position relative to the path of travel of a wagon, or the equivalent thereof.

67. None of the alleged infringing devices include telescoping means for guiding a sub-frame as it is raised and lowered relative to a main frame, or the equivalent thereof.

68. None of the alleged infringing devices include a sub-frame as defined in

Claim 1 adapted to be mounted above a wagon with one end of the sub-frame projecting beyond the rear end of the wagon, or the equivalent thereof.

69. None of the alleged infringing devices include grab means comprising a pair of arms extending generally outward away from said carrier means, or the equivalent thereof.

70. None of the alleged infringing devices include cam surfaces, or the equivalent thereof.

71. None of the alleged infringing devices include expander means on said sub-frame comprising cam surfaces positioned to enter between the inner ends of grab means and "drive them progressively apart" for separating the outer ends, as the grab means passes by the expander means, or the equivalent thereof.

72. None of the alleged infringing devices include spikes on arms, or the equivalent thereof.

73. None of the alleged infringing devices include spikes carried by the outer ends of said grab means to engage the cane, or the equivalent thereof.

74. None of the alleged infringing devices include a "plurality" of "flexible," parallel, endless carrier means, or the equivalent thereof.

75. None of the alleged infringing devices include a "plurality" of parallel, flexible, endless carrier means and separate expander means for each carrier means, or the equivalent thereof.

76. None of the alleged infringing devices include a "plurality" of parallel, flexible, endless carrier means with grab means on each carrier means, or the equivalent thereof.

77. None of the alleged infringing devices include the required sub-frame adapted to be mounted above a wagon with one end of the sub-frame projecting beyond the rear end of the wagon, or the equivalent thereof.

78. None of the alleged infringing devices include a plurality of parallel, flexible, endless carrier means mounted on the same sub-frame, or the equivalent thereof.

79. None of the alleged infringing devices include upwardly open trough means extending laterally beneath a plurality of parallel, flexible, endless carrier means, thereby defining a guide for directing cane delivered by any of the endless carrier means into a single line, or the equivalent thereof.

80. None of the alleged infringing devices include means for driving a flexible, endless carrier means and which com-

prises a power source independent of the wheels of an open-topped vehicle, or wagon, or the equivalent thereof.

81. None of the alleged infringing devices comprise vehicular means which is independent of the open-topped vehicle, or wagon, and at least partially supports the portably mounted main frame and in which the power source is mounted on and drives the independent vehicular means, or the equivalent thereof.

82. None of the alleged infringing devices allegedly made, sold or used by or on behalf of Zeringue's Farm Equipment Service, Henry Zeringue or John Clet Landry include each and every element or its equivalent of any claim of United States Letters Patent No. 3,286,858.

83. Neither Zeringue's Farm Equipment Service nor Henry Zeringue nor John Clet Landry has ever induced another to infringe or contributed to the infringement by anoth-

er of any claim of United States Letters Patent No. 3,286,858.

84. Neither Zeringue's Farm Equipment Service nor Henry Zeringue nor John Clet Landry has ever reconstructed any device which infringes any claim of United States Letters Patent No. 3,286,858.

85. Defendants' structures are not equivalent to plaintiff's cane planter of Claims 1 through 10.

86. To the extent that these Findings of Fact also constitute Conclusions of Law, they are specifically adopted as both Findings of Fact and Conclusions of Law.

CONCLUSIONS OF LAW

1. This is a patent suit brought under the Patent Act, 35 U.S.C. § 1, et. seq. (hereinafter the Patent Act). This Court has jurisdiction of the parties and of the subject matter of this action by virtue of 28 U.S.C. §§ 1338, 2201. There is an actual

controversy between the parties concerning the subject matter of this action, 28 U.S.C. § 2201. Venue is proper as required by 28 U.S.C. § 1400(b).

2. Plaintiff has the burden of proof to establish, by a preponderance of the evidence, that defendants' manufacture, use and/or sale of cane planters have infringed any one of the claims of the Julien '858 patent. Moore v. Shultz, 491 F.2d 294, 298 (10th Cir. 1974), cert. denied, 419 U.S. 930 (1974).

3. The Julien '858 patent is presumed valid. The burden of establishing invalidity of the patent or any claim thereof rests with the defendants. Radio Corp. of America v. Radio Engineering Lab., Inc., 293 U.S. 1, 7 (1934); Continental Oil Company v. Cole, 634 F.2d 188, 195 (5th Cir. 1981); Ingersoll-Rand Co. v. Brunner & Lay, Inc., 474 F.2d 491 (5th Cir. 1973); Van Corp Manufacturing, Inc. v. Townley Industrial Plastics,

Inc., 464 F.2d 16, 17 (5th Cir. 1972), and it must be proved by clear and convincing evidence. Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc., 561 F. Supp. 512 (E.D. La. 1981), aff'd, Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc., 708 F.2d 151 (5th Cir. 1983); Julien v. Gomez & Andre Tractor Repairs, Inc., 438 F. Supp. 763 (M.D. La. 1977).

4. The defendants bear a heavy burden of proof to establish the invalidity or unenforceability of the Julien '858 patent. The courts have variously recognized this burden to be akin to the fraud standard of clear and convincing evidence an to the criminal law standard of proof beyond a reasonable doubt, but, at a minimum, greater than a mere preponderance of the evidence. Ingersoll-Rand Co. v. Brunner & Lay, Inc., 474 F.2d 491, 496 (5th Cir. 1973), cert. denied, 414 U.S. 865 (1973) (citing Hobbs v. United States Atomic Energy Commission, 451

F.2d 849 (5th Cir. 1971); Stamicarbon N.V. v. Escambia Chemical Corporation, 430 F.2d 920 (5th Cir. 1970), cert. denied, 400 U.S. 944 (1970).

5. The Patent Act sets forth three conditions of patentability: novelty, utility and non-obviousness. 35 U.S.C. §§ 101-103.

6. The Julien '858 patent satisfied the separate tests of novelty, utility and non-obviousness and is valid. United States v. Adams, 383 U.S. 39, 48 (1966); Gaddis v. Calgon Corp., 506 F.2d 880, 884 (5th Cir. 1975).

7. An invention is patentable provided the subject matter sought to be patented and the prior art are such that the subject matter as a whole would not have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject pertains. 35 U.S.C. § 103; Sakraida v. Ag Pro, Inc., 425 U.S. 273,

2880 (1976); Graham v. John Deere Co., 383 U.S. 1, 17 (1966); Continental Oil Company v. Cole, 634 F.2d at 195-196.

8. The test of non-obviousness is not whether the individual elements were obvious at the time of the invention, but whether the combination as a whole produces a new and different result which was not obvious. U.S. v. Adams, 383 U.S. at 714-715; Continental Oil Company v. Cole, 634 F.2d at 197.

9. A combination of elements and parts may result in an effect greater than the sum of the several effects taken separately. Such a synergistic result is strong if not conclusive evidence of non-obviousness. Van Corp. Manufacturing, Inc. v. Townley Industrial Plastics, Inc., 464 F.2d at 20.

10. The subject matter as a whole, of the invention defined in Claims 1 through 9 of the Julien '858 patent, would not have been obvious at the time the invention was

made to one having ordinary skill in the art of cane planting.

11. Claims 1 through 9 of the Julien '858 patent express the novel concepts constituting the invention, and such concepts are set forth in terms of a combination of elements and their cooperative physical relationship. The specifications and claims comply with the requirements of 35 U.S.C. § 112.

12. A combination is not rendered unpatentable by the existence of its various elements separately in the prior art. Bates v. Coe, 98 U.S. 31, 48 (1878); Imhaeuser v. Buerk, 101 U.S. 647, 660 (1880).

13. Anticipation is a technical defense which must meet strict standards. Unless all the same elements are found in substantially the same situation and united in the same way to perform the identical function in a single prior art reference, there is no anticipation. Continental Oil

Company v. Cole, 634 F.2d at 195; Hughes Tool Co. v. Ingersoll-Rand Co., 437 F.2d 1106, 1108 (5th Cir. 1971), cert. denied, 403 U.S. 918 (1976).

14. None of the prior art, including the Mayeaux experimental device and the multitudinous patents and publications, listed as Defendants' Exhibits 1-29, 39-45 and 52.64, combined the same elements of the Julien '858 patent in substantially the same situation so as to perform the unique functions of the Julien invention.

15. The defendants have not shown by clear and convincing evidence that the invention of the patent in suit was anticipated by any prior public use of sale. Barbed Wire Patent, 143 U.S. 275, 284 (1892); Southern Implement Manufacturing Co. v. McLemore, 350 F.2d 244, 249-50 (5th Cir. 1965).

16. Hence, Claims 1 through 10, being all of the claims of the Julien '858 patent

asserted in this litigation, are not anticipated by the prior art and are valid.

17. Infringement is the unauthorized making, using, or selling for use for profit of an invention covered by a valid claim of a patent during the line of the patent. 35 U.S.C. § 271.

18. Patents are to be liberally construed so as to uphold and not destroy the inventor's rights. Eibel Process Co. v. Minnesota & Ontario Paper Co., 261 U.S. 45, 63 (1923); Keystone Manufacturing Co. v. Adams, 151 U.S. 139, 144-145 (1894).

19. One form of infringement occurs when an accused device incorporates a teaching literally read. An infringement also occurs when a device appropriates a prior invention by incorporating its innovative concept and, albeit with some modifications and change, performs substantially the same function in substantially the same way to achieve substantially the same result. The

"doctrine of equivalents" shields the inventor from such abuse. Continental Oil Co. v. Cole, 434 F.2d at 191.

20. The determination of equivalency involves an examination of the scope of prior art, the essence or "heart" of the invention disclosed and the step forward the invention offers. Id.

21. Defendants have not actively infringed or otherwise induced infringement of the Julien 3,286,858 Patent either directly or indirectly.

22. The defendants' device is not the equivalent in function and operation of the Julien 3,286,858 Patent.

23. Upon a determination of validity, infringement, and enforceability, a patentee is entitled to an injunction when in accordance with the principles of equity, 35 U.S.C. § 238; Arthur J. Schmitt Foundation v. Stockham Values and Fittings, Inc., 292 F.Supp. 893 (N.D. Ala. 1966), aff'd., 404

F.2d 13 (5th Cir. 1968), cert. denied, 398 U.S. 965, 909 S. Ct. 2177, 25 L. Ed. 2d 549 (1970) . . . and, in the discretion of the Court in an exceptional case, to an award of reasonable attorneys fees, 35 U.S.C. § 285; Livesay Window Co., Inc. v. Livesay Industries, Inc., 251 F.2d 469 (5th Cir. 1958).

24. Plaintiff is not entitled to an aware of reasonable attorney's fees in the instant case.

25. Plaintiff is not entitled to recover damages.

26. Plaintiff is not entitled to recover costs.

27. No exceptional circumstance warrants an award of attorneys' fees, costs or expenses to the defendants in this case.

New Orleans, Louisiana, this 10th day of November, 1986.

/s/ Robert F. Collins
UNITED STATES DISTRICT JUDGE